No. 09-1150

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNIVERSAL TRADING & INVESTMENT CO., INC.,

Petitioner,

vs.

PETRO MIKOLAYEVICH KIRITCHENKO,
PAVLO IVANOVICH LAZARENKO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY

I. The 2006 Ukraine Supreme Court Ruling Validating The Assignment Presents An Important Federal Question About Enforcement Of Foreign Judgments In Favor Of United States Citizens

Respondents attack the premise of the argument of petitioner Universal Trading and Investment Company ("UTICo") that Ukraine Supreme Court held the assignment of Ukraine's claims to it (Pet. 143-44) was valid. (Opp'n 8-10.) Contrary to respondents' contention, Ukraine Supreme Court did not rule solely on procedural grounds. (Opp'n 6, 8.)

In its March 24, 2006 preliminary ruling, Ukraine Supreme Court stated it granted review because "the arguments in the cassation appeal provide the grounds for concluding that the lower courts violated the maxims *of the substantive* and of the procedural law, which led to the wrong resolution of this case. . . ." (App. 161 [emphasis added].) Ukraine Supreme Court's June 24, 2006 decision reached the substantive validity of the power of Ukraine Prosecutor General's Office ("UPGO") to contract with and to assign Ukraine's claims against Lazarenko to UTICo. (App. 164-71.) It overturned the conclusion of the lower court that UPGO lacked authority to engage UTICo for disposing of Lazarenko's assets and furthering the material claims. (App. 167-68.) In no uncertain terms, the decision "confirmed the Agreement that the Ukraine side had assigned to the Firm the material claims with regard to the said real

estate assets. . . ." (App. 168-69.) It also found an assignor-assignee relationship existed under Article 387 of the Civil Procedural Code that Ukraine lower courts did not "properly" consider. (App. 169; AER 427.)

Respondents exalt dicta in Kiritchenko's Ukraine municipal case into binding precedent. (Opp'n 9.) Kiritchenko did not serve or give notice to UTICo in a manner that would permit it to participate in his Ukraine case. (App. 13-14 [9/7/07 Ord. 20-21].) Additionally, Ukraine courts denied Kiritchenko's claims as time-barred. (Pet. 13; App. 11-12.)

Respondent also is incorrect that Ukraine Supreme Court denied review in Kiritchenko's case "on the merits of an appellate decision. . . ." (Opp'n 9 [citing App. 9-15, 29; 3 AER 337-42].) To the contrary, Kiritchenko withdrew the appeal he filed with the Ukraine Supreme Court. (App. 12.) On June 10, 2004 and February 3, 2005, Ukraine Supreme Court denied UPGO's two subsequent appeals, citing procedural flaws without addressing the merits. (App. 14-15.)

It was not until the 2006 Ukraine Supreme Court decision in Lazarenko's case that Ukraine Supreme Court expressed a view on the authority of UPGO to assign Ukraine claims abroad to third parties in the interest of the State. (Pet. 16; App. 167-70.) While the District Court performed an independent analysis of Ukraine's constitution and other law to conclude that

UPGO did not have power under Ukraine law to assign Ukraine's claims to UTICo (Opp'n 9 [citing App. 46-57]), its analysis wrongly assumed Ukraine Supreme Court had not yet decided Lazarenko's appeal. (App. 19.)

Respondents argue the finding by the Ninth Circuit that the August 11, 1999 written assignment "was a sham created only to overcome defendants' initial challenge to standing" (App. 2) "provided an independent basis under United States law for the dismissal of UTI[Co]'s suit." (Opp'n 9-10.) But that cannot be reconciled with the 2006 Ukraine Supreme Court decision that the Ninth Circuit judicially noticed but failed to acknowledge legitimated the assignment. (App. 3, n.1.)

Moreover, the Ninth Circuit misapplied adversity jurisdiction concept to a case arising under its subject matter jurisdiction. Sham assignments are usually, if not exclusively, a creature of diversity jurisdiction cases, where one party attempts to create federal jurisdiction by transferring a claim to a party residing or domiciled in another state. *See, e.g.*, *Attorneys Trust v. Videotape Computer Prod., Inc.*, 93 F.3d 593, 595-96 (9th Cir. 1996). Even if *Attorneys Trust*[1] applied to subject matter jurisdiction cases, there are several factors that the Ninth Circuit should have considered; including (1) whether there

[1] UTICo has not found one decision applying the concept of sham assignments to a case with subject matter jurisdiction.

were good business reasons for the assignment, (2) did the assignee have a prior interest in the item or was the assignment timed to coincide with commencement of litigation, (3) was any consideration given by the assignee, (4) was the assignment partial or complete, and (5) was there an admission that the motive was to create jurisdiction. *Id.* "The objective fact of who really is the party in interest is the most important thing to be determined." *Id.* at 596.

Factors listed in *Attorneys Trust* support the conclusion that the assignment was valid. First, Obykhod's Amicus Letter, executed April 13, 1999, before the original complaint's filing on June 24, 1999 (App. 118-42), shows that Ukraine had good business reasons for the assignment. (*See* App. 142 ["In connection with the above and having all grounds to do so, the Prosecutor General Office of the Ukraine supports suit of UTICo to attach all realty of Petro M. Kiritchenko on the territory of the USA, which was acquired from proceeds from crime and registered on the companies controlled by him."].)

Secondly, UTICo as assignee additionally had a future, actionable interest in the realty created by the 1998 agreements prior to the 1999 assignment. *Restatement (Second) of Torts* § 243; *Weizmann Institute of Science v. Neschis*, 229 F.Supp.2d 234, 253 (S.D.N.Y. 2002). This interest was the equivalent of that of a *bona fide* purchaser of the claims in the United States and as the assignee for valuable consideration of the claims.

There was also actual consideration provided by UTICo to Ukraine, as explained and affirmed in the June 14, 2006 Ukraine Supreme Court decision in Lazarenko's case. (*See* App. 169 ["By virtue of the Instrument of the Prosecutor General's Office of Ukraine, dated August 11, 1999, *that compensation was granted to the Firm* for the works *that had already been accomplished*." [emphases added].)

Regarding the fourth factor, whether the assignment was partial or complete, the August 11, 1999 letter (App. 143-44) was sufficient to transfer to UTICo all of Ukraine's claims, including those for injuries from predicate acts under RICO, to the U.S.-located realty owned by defendants. *See, e.g.*, *Lerman v. Joyce International, Inc.*, 10 F.3d 106, 112-13 (3d Cir. 1993) (holding that claims for RICO injuries were transferrable under a general assignment of "all . . . causes of action" and "claims . . . of whatsoever nature" that eliminated the possibility of split recoveries or duplicative liability by extinguishing the assignor's right to assert Racketeer Influenced and Corrupt Organizations Act ("RICO") claims; *see also United States ex rel. Kelly v. The Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) (holding that "[a]s a general rule, terms of art are not required for a valid Assignment"). Because the U.S. realty assets that Ukraine assigned, identified property by property in the April 13, 1999 Amicus Letter from Obykhod (App. 139), counted towards but did not satisfy the 12% of commission UTICo already earned (App. 144, 168-69), the

assignment completely relinquished all of Ukraine's interest in the assets.

As for the fifth factor, an admission that the motive was to create jurisdiction, respondents' focus on the subjective averment of Ukraine Deputy Prosecutor Obykhod that the assignment was given "solely in order to give the court jurisdiction to hear Ukraine's claims" (O'ppn 4 [citing AER 101-06]) is misplaced.[2] First, Obykhod's successor, Viktor Kudriavtsev, again in office, challenged Obykhod's subjective views in 2003. (3 ER 199.) The Prosecutor General reconfirmed Kudriavtsev's views in a letter to the President. (App. 153.)

Second, because the amended complaint dated October 4, 1999 had asserted a cause of action under RICO (AER 777-84), there was subject matter jurisdiction by the time respondents' first motion to dismiss was heard on January 24, 2000, and thus no need for UPGO to assign Ukraine's rights to engineer diversity jurisdiction. Indeed, Judge Charles Legge made clear the distinction between standing and jurisdiction in disposing of respondents' motion to dismiss UTICo's second amended complaint on June 2, 2000. (7 ER 58 [citing *Airlines Reporting Corp. v. S and N Travel, Inc.*, 58 F.3d 857, 862, n.4 (2d Cir. 1995)].) Judge Legge's finding that UTICo was a real

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[2] "There is some doubt that the subjective 'motive' element is entitled to great weight." *Attorneys Trust*, *supra*, 93 F.3d at 596 (citation omitted).

party in interest, independent of whether there was diversity jurisdiction (7 ER 58), shows the most important factor under *Attorneys Trust*, "[t]he objecttive fact of who really is the party in interest. . . ." 93 F.3d at 596.

The amended complaints, filed after the August 11, 1999 assignment, asserted UTICo's own claims, not Ukraine's claims by proxy, in accordance with the assignment of Ukraine's claims to UTICo. (1 ER 89-166; AER 748-99.) The District Court properly found the claims UTICo asserted on behalf of Ukraine in the original complaint predating the assignment irrelevant to the standing issue. (App. 22-23.)

Granting certiorari on the first question presented will not require "this Court to clarify or interpret the law of Ukraine." (Opp'n 10.) To the contrary, UTICo's first question presents an important question under United States law about the scope of offensive collateral estoppel applied to foreign judgments in favor of United States citizens. Resolution of this question does not require analysis of Ukraine law any more than *Hilton v. Guyot*, 159 U.S. 113, 170-71, 210 (1895), required analysis of the law of France.

II. In Refusing To Apply The Act Of State Doctrine, The Lower Federal Courts Relied Erroneously On Dicta In Lower Ukraine Cases Overruled By The 2006 Ukraine Supreme Court Decision And, In Derogation Of American Interests, Misapplied A Line Of Cases Involving Foreign Government Acts Confiscating Property And Committing Criminal Conduct Outside Its Territory

In opposing UTICo's second question presented, respondents argue the District Court properly held that the act of state doctrine could not apply. (Opp'n 11-13.) On the contrary, recognizing the acts of Ukraine's Executive in 2002-2003 (App. 105-08, 145-59) and the 2006 Ukraine Supreme Court decision (App. 164-72), all approving of UPGO's agreements with UTICo in 1998 (App. 93-95; 3 ER 66-67, 91-92) and assignment of claims to UTICo in 1999 (App. 101-02, 143-44), furthers the comity-based concerns underlying the act of state doctrine.

The power-of-attorney allegations of the original complaint should not distract this Court from the important questions raised by the lower courts' refusal to recognize the acts of Ukraine's Executive in 2002-2003 and the 2006 Ukraine Supreme Court decision, all approving of UPGO's agreements with UTICo in 1998 and assignment of claims to UTICo in 1999. The clearly erroneous ruling of the Ninth Circuit that the assignment was a sham under Federal Rule of Civil Procedure 17 cannot withstand scrutiny as an independent basis for dismissal of petitioner's

claims. Moreover, because the highest levels of Ukraine's Executive approved and ratified the assignment, the ruling contravenes the fundamental tenet of the act of state doctrine that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another. . . ." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

"[B]oth the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government." *First Nat. City Bk. v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972). "It is also buttressed by judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers and the power of the Senate to advise and consent on the making of treaties." *Id.* "[I]t has also been suggested that a doctrine of deference based upon the absence of consensus as to controlling principles of international law allocates legal competence among nations in a manner that promotes the growth of international law. *See generally* R. FALK, *The Status of Law in International Society* 403-442 (1970); R. FALK, *The Role of Domestic Courts in the International Legal Order* 64-138 (1964)." *Alfred Dunhill of London, Inc. v. The Republic of Cuba, et al.*, 425 U.S. 682, 727, n.12 (1974) (Appendix 1 to Opinion).

Respondents suggest that the Executive Branch intervened in this case in support of respondents' case

going forward, notwithstanding the act of state doctrine. (Opp'n 11.) But the reason the Justice Department intervened was actually to request a stay of proceedings because of the criminal prosecution of Lazarenko and Kiritchenko. (6 ER 63, 73.) On December 7, 2005, after the criminal case was over, the District Court granted UTICo's motion to lift the stay. (6 ER 121.) The civil action resumed its course toward trial without further intervention of the United States Government.

Respondents raise the fact that the Executive Branch did not oppose respondents' attempts to dismiss the case. (Opp'n 11.) But "mere silence or neutrality on the part of the Executive" is actually a reason this Court has recognized to refrain from judicial review under the act of state doctrine. *First Nat. City Bk.*, *supra*, 406 U.S. at 767 ("[A]ny exception to the act of state doctrine based on a mere silence or neutrality on the part of the Executive might well lead to a conflict between the Executive and Judicial Branches.").

Respondents assert that "the district court did not create a new, arbitrary rule under the act of state doctrine, and its interpretation of the doctrine did not deviate from this Court's precedent." (Opp'n 11.) Other than expressing disagreement with UTICo, there is little substance to their argument.

UTICo's Petition explains that the District Court misapplied this Court's precedent, involving acts of confiscation by a foreign government of property

located outside the foreign territory, to this case. (*See* Pet. 32 and cases cited therein.) Contrary to the confiscation line of this Court's cases, the present case involves an act of a foreign government that *furthers* United States interests by compensating a Massachusetts corporation "for returning assets abroad to the State that is their rightful owner" and promoting the policies underlying federal RICO law of preventing "the release of stolen Ukraine assets into United States commerce." (Pet. 38.) Thus, the District Court's reliance on confiscation cases conflicts with this Court's precedent in *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), involving acts of foreign government in favor of United States interests. (Pet. 34-36.)

Contrary to respondents' argument, former Deputy Prosecutor General Obykhod's purported disavowal of the plain wording of the August 11, 1999 document "assign[ing]" (Pet. 143.) ownership of Ukraine's claims to UTICo in full is not a proper basis on which not to apply the act of state doctrine to the assignment. (Opp'n 13.) Respondents argued in the District Court that the assignment was a sham, based on the declaration of this Prosecutor that it was given "solely in order to give the court jurisdiction to hear Ukraine's claims." (AER 96, 101.) But Obykhod's declaration actually confirms the validity of the 1999 assignment by explaining it was intended to be in accordance with the 1998 agreement and to assign to UTICo claims of title to defendants' real property

located in the United States on the date of the assignment. (AER 101-02 [Obykhod Decl., ¶¶ 6-7].)

Respondents speculate that Ukraine easily could have provided evidence in this action supporting UTICo's position. (Opp'n 7.) But this argument ignores that Ukraine did just that when, on April 13, 1999, two months before UTICo filed this action, UPGO addressed a "statement of Amicus Curiae" to the District Court in support of UTICo. (App. 98-99; 118-42.)

III. The District Court's Interpretation Of Ukraine's Constitution Deserves To Be Second-Checked To Avoid Frustrating Another Sovereign's Powers To Assign Claims To Third-Parties In Its National Interest

The District Court's ruling based on its own consideration of Ukraine law under Federal Rule of Civil Procedure 44.1 went against the 2006 Ukraine Supreme Court decision on the subject. It also went against the expressed approval of UPGO's relationship with UTICo by the highest echelons of Ukraine's Executive. Most importantly, the District Court's interpretation of Ukraine's constitution leaves no organ of the State with the power to delegate the task of international asset recovery to non-Ukraine professionals and to assign claims belonging to Ukraine to such third-parties to further that objective.

Respondents fail to apprehend this result as a problem, arguing that Ukraine still could have sued in its own name. (Opp'n 13-14, n.6.) But a foreign government may wish not to waive its sovereign immunity, a consequence of suing in its own name in this country. There also may be situations where, as here, a third-party has earned ownership of a claim originally belonging to the foreign government through work performed for that country.

Recognizing Ukraine has power under its constitution to adopt a multitude of means to achieve the ends of its enumerated powers does not contradict express constitutional limitations on the State's authority. Regarding the third question presented, the Court should hold that, if a federal court must interpret the constitution of another nation, it should not do so in a manner that restricts the foreign government from exercising peaceful powers other sovereigns enjoy.

Respectfully submitted,

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